

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





74-2374

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x

PIETRO C. RUBINO, for himself and  
all other persons similarly  
situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-  
Appellant,

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees

----- x

JOINT APPENDIX

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Stephen Gillers  
Attorney for Plaintiffs-  
Appellants  
250 Broadway  
New York, N. Y. 10007  
349-4646

Samuel Gottlieb  
Gainsburg, Gottlieb, Levitan  
& Cole  
Attorneys for Plaintiff-  
Intervenor-Appellant  
122 East 42 Street  
New York, New York  
697-3449

Louis J. Lefkowitz  
Attorney General of the  
State of New York  
Attorney for John J.  
Ghezzi and Pro Se  
Two World Trade Center  
New York, New York  
488-3396

Adrian P. Burke  
Corporation Counsel  
Attorney for all other  
Defendants  
Municipal Building  
New York, New York 10007  
566-8391

PAGINATION AS IN ORIGINAL COPY



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x

PIETRO C. RUBINO, for himself and  
all other persons similarly  
situated, et al.,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor,  
Appellant,

AFFIDAVIT OF  
SERVICE BY MAIL

Docket No. 74-2374

-against-

JOHN J. GHEZZI, et al.,

Defendants-Appellees.

----- x

STATE OF NEW YORK )  
                              ) ss.:  
COUNTY OF NEW YORK )

ANN M. GERLOCK, being duly sworn, deposes and says:  
deponent is not a party to the action, is over 18 years of  
age and resides at 418 East 81 Street, New York, New York  
10028.


On the 6 day of November, 1974, deponent served  
the within Joint Appendix upon

Samuel Gottlieb  
Gainsburg, Gottlieb, Levitan  
& Cole  
Attorneys for Plaintiff-  
Intervenor-Appellant  
122 East 42 Street  
New York, New York

Louis J. Lefkowitz  
Attorney General of the  
State of New York  
Attorney for John J. Ghezzi  
and Pro Se  
Two World Trade Center  
New York, New York

Adrian P. Burke  
Corporation Counsel  
Attorney for all other  
Defendants  
Municipal Building  
New York, New York 10007

at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in - a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

  
ANN M. GERLOCK

Sworn to before me this  
6 day of November, 1974.



STEPHEN GILLERS  
Notary Public, State of New York  
No. 31-4507113  
Qualified in New York County  
Commission Expires March 30, 1975



TABLE OF CONTENTS

	<u>Page</u>
Docket Entries . . . . .	A1
Complaint. . . . .	A3
Order to Show Cause. . . . .	A13
Memorandum Endorsed on Order to Show Cause . . . . .	A20
Transcript . . . . .	A21

CIVIL DOCKET  
UNITED STATES DISTRICT COURT

Jury demand date

16-22-74

A1

JUDGE GRIESA

D. C. Form No. 106 Rev.

84 CIV. 4332

TITLE OF CASE

ATTORNEYS

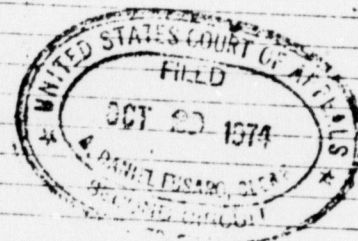
PIETRO C. RUBINO, for himself and all  
other persona similarly situated; and  
PHILIP J. ZICHELIO

For plaintiff:

Stephen Gillers  
250 B'way, N.Y.C. 10007 DI9-4646

VS.

JOHN J. GHEZZI, individually and in  
his capacity as Acting Secretary of  
State of the State of New York;  
HE MAN KATZ, individually and in his  
capacity as City Clerk of the City  
of New York;  
YVAN E. IRIZARRY, individually and in  
his capacity as Finance Administrator  
of the City of New York; and  
ALICE SACHS,  
ERLICH A. EASTMAN,  
HERBERT J. FEUER,  
CHARLES A. AVARELLO,  
JAMES F. BASS,  
ELIZABETH A. CASSIDY,  
ANTHONY SADOWSKI,  
JOSEPH J. PREVITE,  
STANLEY C. KOCHMAN, and  
SALVATORE SCALAFANI, all individually  
and in their capacities as the members of  
the Board of Elections of the City of New York



For defendant:

STATISTICAL RECORD

COSTS

DATE

NAME OR  
RECEIPT NO.

REC.

DISB.

J.S. 5 mailed x

Clerk

J.S. 6 mailed

Marshal

Basis of Action: Challenge to  
state mandatory retirement laws  
for elected judges.

Docket fee

Witness fees

Action arose at:

Depositions



74 CIV 4332 PIETRO C. RUBINO, et al VS. JOHN J. GHEZZI, et al

74 CIV 4

JUDGE GRIESA

74 CIV 4332

DATE	PROCEEDINGS	Date Judge
Oct 3-74	Filed complaint & issued summons.	
Oct.4-74	Filed Affidvt & Show Cause Order to convene a three Judge Court by pltf. Rec. 10-13-74.	
Oct.4-74	Filed pltf's memo of law re show cause order.	
Oct.4-74	Filed summons & returns made by personal service. Served: On the back of the summons Finance Adm. By: M. Goldstein 10-3-74 City Clerks Office J. Sofer 10-3-74 NYS, Dep't of State J. Butcher 10-3-74 Ed. of Elections, NYC J. S. 10-4-74	
Oct.4-74	Filed Clerk's Order pursuant to 28 U.S.C. 2284 of notice of hearing to the Governor & Attorney General of the State of New York.	
Oct.9-74	Filed return receipt of certified mail #287607.	
Oct.9-74	Filed return receipt of certified mail #287608.	
Oct.21-74	Filed Memo-End. on show cause order of 10-4-74. The application for convening a three judge court is denied & the action is dismissed.....So Ordered, GRIESA, J. M/N	
Oct 23-74	Filed Transcript of Proceedings dated 10-18-74..	
Oct 23-74	Filed Pltffs' Notice of Appeal to USCA from an order denying pltffs; motion for a 3 Judge court ent. 10-18-74....Notices mailed on 10-24-74 to: A.Seth Greenwald, Office of the Atty Gen. NYS 2 World Trade Center, NYC William DeWitt, Corp. Counsel. Municipal Bldg. NYC Samuel Gottlieb. 122 E 42 St., NYC	

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

PIETRO C. RUBINO, for himself and all  
other persons similarly situated; and  
PHILIP J. ZICHELO,

Plaintiffs,

-against-

JOHN J. GHEZZI, individually and in  
his capacity as Acting Secretary of  
State of the State of New York;  
HERMAN KATZ, individually and in his  
capacity as City Clerk of the City of  
New York; IVAN E. IRIZARRY, individually  
and in his capacity as Finance Adminis-  
trator of the City of New York; and  
ALICE SACHS, ELRICH A. EASTMAN, HERBERT J.  
FEUER, CHARLES A. AVARELLO, JAMES F.  
BASS, ELIZABETH A. CASSIDY, ANTHONY  
SADOWSKI, JOSEPH J. PREVITE, STANLEY C.  
KOCHMAN, and SALVATORE SCLAFANI, all  
individually and in their capacities as  
the members of the Board of Elections  
of the City of New York,

COMPLAINT

Docket No. \_\_\_\_\_

Defendants.

----- x

INTRODUCTION

This is an action challenging, on federal constitutional grounds, provisions of New York law mandating that elected judges, sitting in various State courts throughout the State of New York,



retire from their elected offices at the end of the year in which they celebrate their 70th birthday, whether or not their term of office has expired.

#### JURISDICTION

1. The jurisdiction of this Court is based on 28 U.S.C. 1331, 1343 and 2201 et seq. This action is based on rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and by 42 U.S.C. 1983. The amount in controversy exceeds \$10,000, exclusive of interest and costs.

2. This action seeks preliminary and permanent injunctive relief against the enforcement of Article 6, Section 25 (b) of the New York State Constitution and Section 23 of the New York State Judiciary Law. A three-judge District Court is required pursuant to 28 U.S.C. 2281 and 2284 since plaintiffs seek to enjoin the enforcement of a State Constitutional provision and statute on the ground that they violate the federal Constitution.

#### PARTIES

3. Plaintiff PIETRO C. RUBINO is a registered voter and a citizen and domicile of the district from which plaintiff Philip J. Zichello was elected. Mr. Rubino voted for Judge Zichello for the

position Judge Zichello now holds and for his present term of office. Mr. Rubino continues to live in the district from which Judge Zichello was elected. Mr. Rubino is over 70 years of age. Mr. Rubino brings this action as a class action, pursuant to Rule 23 (a) and (b) (2) FRCP. He represents two classes, namely:

(a) All persons over 70 years of age who are eligible voters in the State of New York; and

(b) All persons who voted for Judge Zichello.

Each of these classes is too numerous to allow joinder, the questions of law and fact are common to the classes, Rubino's claims are typical of the claims of the classes and he will fairly and adequately represent their interests. Defendants are acting and refusing to act on grounds generally applicable to each class, making declaratory and injunctive relief with respect to each class appropriate.

4. Philip J. Zichello is a Judge of the Civil Court of the City of New York. He was elected on November 4, 1969 to a ten-year term of office on that Court from the Eighth District, County of New York, City and State of New York. On December 2nd, 1969, James M. Power, then President of the Board of Elections in the City of New York, certified Judge Zichello's election. A copy of the Certificate of Election is annexed as Exhibit A.



5. Subsequent to his election, Judge Zichello duly took his oath of office and commenced his duties as a Judge of the Civil Court of the City of New York.

6. Judge Zichello was born on November 1, 1904.

7. Judge Zichello has been exercising the powers and assuming the duties of a Judge of the Civil Court of the City of New York continuously from January 1, 1970 to the date of this Complaint, and continues to do so.

8. Judge Zichello brings this action in his individual capacity and not as a class action.

9. John J. Ghezzi is the Acting Secretary of State of the State of New York, responsible for declaring vacancies in elective positions in the State of New York and for forwarding the declarations of such vacancies to the appropriate government officials.

10. Ivan E. Irizarry is the Finance Administrator of the City of New York. He is responsible for disbursing salary checks to the Judges of the Civil Court of the City of New York.

11. Herman Katz is the City Clerk of the City of New York. He has the responsibility, among others, of administering the oath of office to newly elected Judges of the Civil Court of the City of New York.

12. The remaining defendants constitute the Board of Elections of the City of New York. It is their responsibilities, among others, to conduct elections for the position of Judge of the Civil Court of the City of New York and declare the appropriate winner of such elections.

13. Each of the defendants has, on information and belief, other duties with regard to the election, induction, compensation and recognition of persons holding the office of Judge of the Civil Court of the City of New York.

#### FACTS

14. Under the terms of the provisions of the New York State Constitution and the New York State Judiciary Law cited above, Philip J. Zichello is required to retire from the position of Judge of the Civil Court of the City of New York on December 31, 1974. He will be 70 years of age on November 1, 1974.

15. Except for the application of the contested provisions of New York State law, Philip J. Zichello would be entitled to complete his term of office as an elected Judge of the Civil Court of the City of New York. This term expires December 31, 1979.



16. The total compensation that would be due Philip J. Zichello if he completed his duly elected term of office exceeds ten thousand dollars (\$10,000).

17. The defendants intend to comply with the mandatory retirement provisions of the New York State law and have, in fact, begun the process of providing for the election of a successor to Philip J. Zichello.

18. Plaintiffs have no adequate remedy at law.

19. Philip J. Zichello is mentally and physically capable of exercising the powers and duties of a Judge of the Civil Court of the City of New York and is among the most prolific Judges on that Court.

#### FIRST CAUSE OF ACTION

20. Plaintiffs repeat the allegations in all the preceding paragraphs.

21. The mandatory retirement provisions of the New York State law violate Philip J. Zichello's rights under the First and Fourteenth Amendments to the United States Constitution. Specifically, they deny him freedom of speech, freedom of association, the right to petition the government for redress of grievances,

due process of law and the equal protection of the laws.

SECOND CAUSE OF ACTION

22. Plaintiffs repeat the allegations in the prior paragraphs.

23. The New York State mandatory retirement provisions deny Pietro C. Rubino and all persons who voted for Philip J. Zichello rights protected by the First and Fourteenth Amendments to the United States Constitution. Specifically, they deny freedom of speech, freedom of association, the right to vote, the right to petition the government, due process of law and the equal protection of the laws.

THIRD CAUSE OF ACTION

24. Plaintiffs repeat the allegations in the prior paragraphs.

25. The New York State mandatory retirement provisions deny Pietro C. Rubino and all eligible New York State voters over the age of 70 rights protected by the First and Fourteenth Amendments to the United States Constitution. Specifically, they deny plaintiffs freedom of speech, freedom of association, the right to



vote, the right to petition the government, due process of law and the equal protection of the laws.

WHEREFORE, plaintiffs pray that a three-judge District Court be convened and that that Court:

(a) Declare that Article 6, Section 25 of the New York State Constitution and Section 23 of the New York State Judiciary Law are unconstitutional in so far as they require elected Judges whose terms of office have not expired to retire from their elected positions;

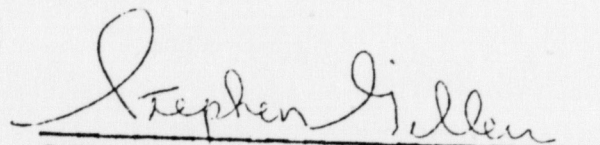
(b) Restrain the defendants and each of them from taking any action toward the election, confirmation, induction or recognition of any successor to Philip J. Zichello as a Judge of the Civil Court for the City of New York;

(c) Restrain the defendants and each of them from ceasing to recognize and compensate Philip J. Zichello as a Judge of the Civil Court of the City of New York and from in any way impeding or interfering with the exercise by Philip J. Zichello of the powers and the duties of a Judge of the Civil Court of the City of New York; and

All

(d) Grant such other, further and different relief as the Court deems just and proper.

Dated: New York, New York  
October 1, 1974



STEPHEN GILLERS  
Attorney for Plaintiffs  
250 Broadway  
New York, N. Y. 10007  
(212) 349-4646



## Certificate of Election

THE  
BOARD OF ELECTIONS  
IN  
THE CITY OF NEW YORK

80 VARICK STREET  
New York, N. Y. 10013

New York, December 2, 1969.

The Board of Elections in The City of New York, being organized pursuant to the provisions of Section 276 of Chapter 100 of the Laws of 1949 of the State of New York, as the Board of Canvassers in the City of New York, and of each of the several Counties therein, and having canvassed the official returns for the City of New York and each of the respective counties therein, and made and filed separate tabulated statements of the votes cast in the

COUNTY OF NEW YORK

for the office of JUSTICE OF THE CIVIL COURT-8th DISTRICT

at the general election held in said City or County or Borough thereof on the Fourth day of November, 1969, and the said Board of Canvassers having ascertained and determined by the official statements and returns thereof duly recorded and filed, who was by the greatest number of votes elected to such office, now therefore, I DO HEREBY CERTIFY that

Philip J. Zichello, 305 E 115th St. New York

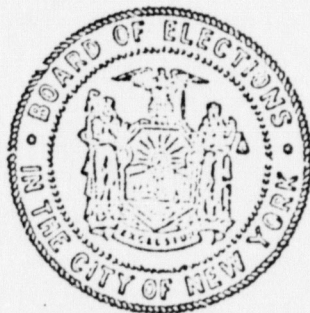
was by the greatest number of votes given at the said election declared by said Canvassing Board to be elected to the office of JUSTICE OF THE CIVIL COURT-8th DISTRICT

Given at the office of the Board of Elections in the City of New York, the Second day of December, in the year of our Lord one thousand nine hundred and Sixty-Nine

JAMES M. POWER,  
President.

Countersigned,

THOMAS MALLEE,  
MAURICE J. O'ROURKE,  
J. J. DUBERSTEIN,  
Commissioners.



Attest:

*Alexander J. Bassett*  
Administrator.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

PIETRO C. RUBINO, for himself and all  
other persons similarly situated; and  
PHILIP J. ZICHELLO,

Plaintiffs,

-against-

JOHN J. GHEZZI, individually and in  
his capacity as Acting Secretary of  
State of the State of New York;  
HERMAN KATZ, individually and in his  
capacity as City Clerk of the City of  
New York; IVAN E. IRIZARRY, individually  
and in his capacity as Finance Adminis-  
trator of the City of New York; and  
ALICE SACHS, ELRICH A. EASTMAN, HERBERT J.  
FEUER, CHARLES A. AVARELLO, JAMES F.  
BASS, ELIZABETH A. CASSIDY, ANTHONY  
SADOWSKI, JOSEPH J. PREVITE, STANLEY C.  
KOCHMAN, and SALVATORE SCLAFANI, all  
individually and in their capacities as  
the members of the Board of Elections  
of the City of New York,

Defendants.

----- x

Upon the attached affirmation of Stephen Gillers, the  
affidavit of Philip J. Zichello, and the complaint, it is

ORDERED that the defendants show cause before this Court  
at Courtroom 1505 of the United States Courthouse for the  
Southern District of New York, 40 Centre Street, Foley Square,  
New York, New York, on the 18th day of October, 1974 at

JUDGE GRIESA  
ORDER TO SHOW CAUSE

Docket No. 74 Civ. 4332



3 o'clock in the *AFTERNOON*, or as soon thereafter as counsel can be heard, why an order should not be entered:

1. Convening a District Court of three judges pursuant to 28 U.S.C. 2281 and 2284, for the hearing of this cause, including plaintiffs' applications for preliminary and permanent injunctions;

2. Restraining the defendant John J. Ghezzi from declaring a vacancy in the position now held by plaintiff Philip J. Zichello, and if such vacancy has already been declared, requiring defendant Ghezzi to withdraw such declaration;

3. Restraining defendant Herman Katz from taking any action towards the election, qualification, confirmation or induction of a successor in office to the plaintiff Philip J. Zichello;

4. Restraining the defendant Ivan E. Irizarry from ceasing to pay to the plaintiff Philip J. Zichello the legally established salary for the office of Judge of the Civil Court of the City of New York prior to January 1, 1980;

5. Restraining the defendant members of the New York City Board of Elections from taking any action toward the election,

qualification, confirmation or induction of a successor in office to the plaintiff Philip J. Zichello;

6. Restraining all of the defendants and each of them, individually and in their official capacities, from treating any one other than Philip J. Zichello as the duly elected Judge of the Civil Court of the City of New York from the district from which he was elected, and restraining them further from taking any action toward interfering with the exercise by Philip J. Zichello of his legal powers as a Judge of the Civil Court of the City of New York; and

7. For such other, further and different relief as the Court deems just and proper.

ORDERED that the Clerk of the Court, pursuant to 28 U.S.C. 2284, give at least five days notice of the hearing to the Governor and Attorney General of the State of New York by registered or certified mail; and

ORDERED that personal service of a conformed copy of this order, together with copies of all supporting papers, on or before the 4TH day of October, 1974, at 5 o'clock in the AFTER-NOON in the following quantities and at the following places shall be deemed due and sufficient service:



1. Upon the defendant John J. Ghezzi, by personally delivering a conformed copy to anyone authorized to accept service at the New York City office of the Secretary of State of the State of New York at 270 Broadway, New York, New York;

2. Upon the defendant Ivan E. Irizarry by delivering a conformed copy to anyone authorized to receive service at the office of the Finance Administrator of the City of New York at the Municipal Building, City of New York, New York, New York;

3. Upon the defendant Herman Katz by delivering a conformed copy to anyone authorized to receive service at the office of the City Clerk of the City of New York, Municipal Building, City of New York, New York, New York;

4. Upon the members of the Board of Elections of the City of New York by delivering a conformed copy to anyone authorized to receive service at the office of the Board of Elections of the City of New York, 80 Varick Street, New York, New York.

Dated: New York, N. Y.  
October 3, 1974

THOMAS P. GRIESA  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

PIETRO C. RUBINO, for himself and  
all others similarly situated; et al.,

Plaintiffs,

AFFIDAVIT

-against-

JOHN J. GHEZZI, et al.,

Defendants.

----- x

STATE OF NEW YORK )

) ss: .

COUNTY OF NEW YORK )

PHILIP J. ZICHELO, being duly sworn, says:

1. I am one of the plaintiffs in the captioned action.
2. I have read the Complaint and know the allegations there to be true of my own knowledge, except that with respect to the allegations of plaintiff Rubino, I believe them to be true.
3. I request that the Court grant the preliminary injunctive relief prayed for in the Order to Show Cause.

Sworn to before me this  
2<sup>nd</sup> day of October, 1974.

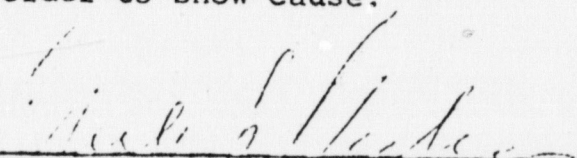
SUBJECT COURT

1 day Police, State of New York

No. 31-40X113

Qualified in New York County

Commission Expires March 30, 1975.

  
Philip J. Zichello



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
PIETRO C. RUBINO, for himself and  
all others similarly situated, et al.,

Plaintiffs,

-against-

AFFIDAVIT

JOHN J. GHEZZI, et al.,

Defendants.  
-----x

STATE OF NEW YORK )  
                                  ) ss.  
COUNTY OF NEW YORK )

STEPHEN GILLERS, being duly sworn, says:

1. I am the attorney for the plaintiffs in this action.
2. I make this Affidavit in support of plaintiffs' request to have service in this action made by me or my agent in lieu of service by the United States Marshall's office, and to permit their motions for a three-judge court and for preliminary injunctive relief to be brought on my Order to Show Cause.
3. All defendants are government officials with offices in New York City. Service on them will be relatively easy. Since this is an Order to Show Cause, I wish to be certain that service

is made promptly. I therefore request that the Court specially appoint me or agents of my office to make service pursuant to Rule 4(a) Fed. R. Civ. P.

4. Plaintiffs bring on this motion for a three-judge court and preliminary injunctive relief by Order to Show Cause, rather than by regular notice of motion, because time is of the essence. The requested relief may affect a New York State election, scheduled for November 5, 1974, and the proper officeholder of a seat on the New York City Civil Court as of January 1, 1975.

5. No prior request for this relief has been made.

---

Stephen Gillers

Sworn to before me this 3rd day of October, 1974.

---

United States District Judge



MEMORANDUM ENDORSED ON ORDER TO SHOW CAUSE

The application for convening a 3-judge Court is denied and the action is dismissed. So ordered.

10/18/74

s/ Thomas P. Griesa  
U.S.D.J.

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 -----  
4 PIETRO C. RUBINO, for himself and all :  
5 other persons similarly situated and :  
6 PHILIP J. ZICHELLO, :

7 Plaintiffs, :

8 v :

74 Civ. 4332

9 JOHN J. GEZZI, et al, :

10 Defendants. :  
11 -----

12 New York, New York  
13 October 18, 1974

14 Before

15 HON. THOMAS P. GRIESA, D.J.

16 Appearances

17 STEPHEN GILLERS, ESQ.  
18 ELLIOT A. TAIKEFF, ESQ.  
Attorneys for Plaintiffs

19 WILLIAM P. DeWITT, ESQ.  
Asst. Corporation Counsel, City of New York

20 A. SETH GREENWALD, ESQ.  
21 Asst. Attorney General, State of New York

22 JOSEPH SAMET, ESQ.  
Assn. Civil Court Judges

23 SAMUEL GOTTLIEB, ESQ.  
24 Attorney for proposed intervenors and/or amicus curiae

25 MICHAEL DIKMAN, ESQ.  
Assn. Criminal Court Judges

ELLIOT BISKIND, ESQ.  
Assn. Criminal Court Judges



1 me

2

2 THE COURT: Let me put my decision on the record.

3 This is an action brought by Philip J. Zichello,  
4 a Judge of the Civil Court in New York City, who was elected  
5 to that office on November 4, 1969, and assumed his duties  
6 on January 1, 1970.

7 Judge Zichello was born November 1, 1904, and will  
8 be 70 years old at the first of November of this year.

9 Judge Zichello seeks a declaration of the invalidity  
10 of the provision in the New York Constitution and the  
11 provision in the New York Judiciary Law providing mandatory  
12 retirement of Civil Court Judges at the age of 70.

13 The relevant provision are Article VI, Section  
14 25B of the New York Constitution and Section 23 of the  
15 New York Judiciary Law.

16 Judge Zichello urges that he is entitled to serve  
17 his full ten-year term as provided by another provision of the  
18 New York Constitution, Article VI, Section 15.

19 All of these constitutional and statutory provisions  
20 have been in effect for a number of years and were in effect  
21 at the time Judge Zichello was elected in 1969, and at the  
22 time he assumed his duties, January 1, 1970.

23 In addition to Judge Zichello, there is also a  
24 plaintiff by the name of Pietro C. Rubino. Mr. Rubino is a  
25 voter in the district which elected Judge Zichello. He

1 me 3  
2 voted for Judge Zichello. He is over 70 years of age. He  
3 brings this action on behalf of himself and in behalf of all  
4 other persons who voted for Judge Zichello in 1969 and all  
5 eligible voters in the state over the age of 70.

6 Judge Zichello does not attempt to represent a  
7 class. As of today, intervention was permitted to another  
8 Civil Court Judge, Harry T. Nussbaum.

9 The plaintiffs request the convening of a three-  
10 judge court under 28 USC Section 2281 on the ground that  
11 this is an action to enjoin a state statute.

12 The defendants urge that there is no substantial  
13 federal question, no substantial constitutional question,  
14 and that the three-judge court should not be convened and  
15 the action should be dismissed.

16 I am denying the motion to convene a three-judge  
17 court and dismissing the action.

18 A variety of arguments have been made to the effect  
19 that the mandatory retirement provisions under New York law  
20 applicable to the Civil Court Judges violate the  
21 United States Constitution, particularly the First and  
22 Fourteenth amendments.

23 I find that none of these arguments are substantial.  
24 For instance, plaintiffs argue that the 70 year retirement  
25 provision violates Judge Zichello's First Amendment right



1 me

2 to seek and hold office. The cases cited under this heading  
3 of the argument have nothing really to do with a retirement  
4 provision.

5 In my view there is no case under the First  
6 Amendment which can reasonably be interpreted as preventing  
7 the State of New York from establishing terms for its elected  
8 officials, including judges, and as part of the establishment  
9 of such terms, it would seem obvious that the State may,  
10 in its Constitution and in its statutes, provide for  
11 retirement of judges at the age of 70 years.

12 I will not deal specifically with every single one  
13 of the constitutional arguments presented by plaintiffs. I  
14 will not deal specifically in this bench decision with each  
15 and every such argument. I have considered the arguments and  
16 I find them without merit.

17 Basically, it seems to me clear that the people of  
18 the State of New York in their Constitution and the Legisla-  
19 ture of the State of New York in its Judiciary Law have the  
20 unquestioned right to provide for mandatory retirement of  
21 judges at the age of 70. There can be no reasonable argument  
22 in my view that such constitutional and statutory provisions  
23 deprive Judge Zichello of liberty or property, or interfere  
24 with his First Amendment rights under the Federal Constitution.

25 There is abundant evidence, to say the least, of

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2 actions taken by administrative boards, the Congress of the  
3 United States, and state legislatures in establishing  
4 retirements for the age of 70 or ages thereabouts. There is  
5 such a body of legislative activity of this kind as to make it  
6 really impossible to say that the people of New York and the  
7 Legislature of New York were unreasonable in their mandatory  
8 retirement provisions or violated the Federal Constitution  
9 in any way.

10 One specific argument should be dealt with, and  
11 that is an equal protection argument relating to a  
12 differentiation in treatment as to the Civil Court Judges  
13 versus certain other judges or justices of the state.

14 It is provided in the case of the Judges of the New  
15 York State Court of Appeals and Justices of the Supreme Court  
16 that these two types of judges may, following the age of 70,  
17 perform the duties of a Justice of the Supreme Court provided  
18 that it shall be certificated that the services of such  
19 Judges or Justices are necessary to expedite the business  
20 of the court, and that such persons are mentally and physically  
21 able and competent to perform the full duties of such office.  
22 Service under this provision may be made under the conditions  
23 specified until the individual reaches the age of 76.

24 It seems to me perfectly clear that this is not a  
25 denial of equal protection. The legislature and the people



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2 of the State of New York in their Constitution and in  
3 their Judiciary Law had a perfectly valid ground, without  
4 question, to make a minor differentiation between the two  
5 categories of judges and provide for a short additional  
6 service under certain circumstances for Court of Appeals  
7 Judges and Supreme Court Justices in the State Supreme Court.

8 The differentiation in treatment does not in my  
9 view in any way raise a constitutional question. It goes  
10 without saying that in my dismissal of this case and in  
11 my refusal to convene a three-judge court, I am in no way  
12 indicating any lack of sympathy with the position and views  
13 of Judge Zichello and the others who have appeared before  
14 me today and the others who are interested in this  
15 proceeding.

16 I know as well as anyone that men who have passed  
17 the age of 70 years can continue to perform all kinds of  
18 services, including services on the judiciary, and I know  
19 as well as anyone that blanket retirement rules can have  
20 their effects of imposing hardship in individual cases.  
21 But it is equally clear that it is my limited function to  
22 try to assess the existence or non-existence of a valid  
23 question as to whether the New York provisions violate the  
24 Federal Constitution.

25 I am not acting as a drafter of the New York

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2 Constitution or as a member of its Legislature, and having  
3 in mind my limited role, I can not conscientiously hold  
4 that there is any constitutional question which requires  
5 the continuation of this action and I am dismissing it.

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